Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re **Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (SDARS III)**	**Docket No. 16-CRB-001-SR/PSSR (2018-2022)**

SIRIUS XM'S REPLY IN SUPPORT OF ITS MOTION FOR REHEARING

I. THE JUDGES' USE OF AN INAPPROPRIATE MEASURE OF ARPU CONSTITUTES CLEAR AND REVERSIBLE ERROR

The economics of the Judges' Initial Determination was grounded in a per-subscriber fee of [redacted] that was adjudged to meet the 801(b)(1) standard that governs this proceeding. The Judges intended to convert that fee into the percentage of Sirius XM's Gross Revenues for the 2018-2022 period that would generate such fee. That calculation required an assessment of Sirius XM's average revenue per user ("ARPU"). To maintain the integrity of the [redacted] per-subscriber fee, it was crucial that the correct "regulatory ARPU" be used in the percentage-rate conversion. Given the disputed hearing record regarding what should be included and excluded from Gross Revenues, it was not possible for the parties to provide the Judges with the precise ARPU to be used for this purpose. Each side instead used illustrative ARPU data based on Sirius XM's reported Gross Revenues in 2016. At the same time, both sides' economists agreed that it was imperative that the Judges use the ARPU which would flow from the Gross Revenues definition actually adopted by the Judges for the 2018-2022 rate period. *See* SXM Br. at 4-5.

Sirius XM's Motion for Rehearing ("Motion") is necessitated by the Judges' failure to do so and their use, instead, of what is now a superseded ARPU of [redacted]. That figure does not incorporate amounts that the Judges have now determined to be included in the definition of

Gross Revenues, which has the effect of increasing the reportable ARPU. Simple math demonstrates the prejudicial effect of this error. By dividing the per-subscriber fee determined to be reasonable by an understated ARPU, the Judges elevated the prescribed percentage-of-revenue fee above what it should be. As the Motion demonstrates, were Sirius XM required to pay royalties by applying the erroneous 15.5% against the actual – higher than [redacted] – ARPU now in place, the economic impact would be to supplant the [redacted] per-subscriber rate determined by the Judges to be the reasonable rate with a per-subscriber rate of at least [redacted], based solely on changes to the Gross Revenues definition. SXM Br. at 3, 7-8. The economic impact of failing to correct this error would be increasing royalties to the record industry by more than $150 million.[1]

SoundExchange's Opposition fails to challenge this fundamental error or its resulting economic impact, effectively conceding both. Its factually incorrect response, instead, contends that Sirius XM claimed that the correct ARPU for the Judges to use was [redacted], and that Sirius XM failed to provide the Judges with a basis to correct the ARPU calculation. As a result, SoundExchange concludes, Sirius XM must live with the consequences. Those arguments are completely without merit.

SoundExchange first argues that Professor Shapiro used [redacted] in his own royalty calculations and thus conceded the propriety of that ARPU calculation. That is flatly incorrect. Professor Shapiro used [redacted] illustratively to show how to convert his proposed per-subscriber fee into a percentage of revenue. Both sides, however, were well aware that the definition of Gross Revenues that would govern going forward was hotly disputed before the

[1] This windfall is derived using the same approach as taken by SoundExchange, *see* Opp. at 4 n.5, but using the corrected ARPU of [redacted].

Judges.[2] To compensate for this uncertainty, Professor Shapiro repeatedly and consistently stated that it would be inappropriate to derive the percentage-rate royalty using this [redacted] if the Judges' Determination altered Sirius XM's revenue-reporting obligations – a point with which SoundExchange's own witnesses were in complete agreement. *See* SXM Br. at 4-5.

SoundExchange's related assertion that Sirius XM failed to provide the Judges with the correct ARPU is highly misleading. Given the open issues relating to the definition of Gross Revenues, providing the precise number was impossible. Instead, in its post-trial briefing, Sirius XM appropriately provided all of the necessary data (from an exhibit in evidence) to allow the Judges to adjust the [redacted] ARPU to account for any changes made to the Gross Revenues definition, along with illustrative examples of exactly how such adjustments should be made.[3] *See* SXM Br. at 5-8. Sirius XM could not reasonably have done more than it did: provide the Judges with the precise methodology to make the calculation and the necessary data to do so in the event the going-forward regulations called for the inclusion of revenue categories that were *excluded* from the 2016 "regulatory ARPU" of [redacted]. SoundExchange's extreme position, that it was incumbent upon Sirius XM to have hit a then-unknowable ARPU bullseye of [redacted] if it was to be heard on this Motion, both defies common sense and is noticeably bereft of supporting authority.[4]

---

[2] SoundExchange identified no fewer than seven different exclusions Sirius XM had taken in the past that it sought to eliminate under the new regulations. *See* Sirius XM PFF § V.B, D, F.

[3] SoundExchange's suggestion that Sirius XM's calculation of an appropriate ARPU requires data that is not in the record, *see* SX Opp. at 8-9, is simply inaccurate. As was shown in Sirius XM's Motion and the exhibits attached thereto, calculation of the [redacted] ARPU is based entirely on data in the record, and uses the very time period – January to June 2016 – that SoundExchange's own expert used to derive the [redacted] ARPU that the Judges mistakenly relied on. The September 2016 calculation referenced in the Opposition was merely an additional illustration and plays no role in Sirius XM's proposed correction to [redacted]

[4] Notably, SoundExchange fails to mention 37 C.F.R. § 351.14, which provides that a party does not waive its ability to object to "a provision in the determination" where the provision "conflicts with a proposed finding of fact or conclusion of law filed by the party." Clearly the Judges' use of an ARPU

The uncertainty regarding the going-forward Gross Revenues definition disposes of SoundExchange's corollary argument that Sirius XM could have predicted and identified the precisely correct ARPU but chose not to solely for tactical reasons tied to the so-called "Underpayment Case." *See* SX Opp. at 5-7. This rationalization obscures the sole relevant fact from that separate litigation: that the 2016 Premier revenue at issue was *not* included in the [redacted] ARPU, regardless of what the Judges may have said about the propriety of that exclusion, and regardless of what Sirius XM might have inferred from that decision as to its reporting obligations during the 2018-2022 period.[5] The ARPU mismatch between Sirius XM's revenue reporting *going forward* and Sirius XM's past reporting is what matters to this Motion.[6]

Nor is it relevant that the Judges could have made any number of other changes to either ARPU or opportunity cost. *See* SX Opp. at 3-4. The fact is, they did not. Whatever other calculations they might have made – and SoundExchange was certainly free to move for rehearing if it felt others were required – are of no moment. Also unavailing

---

figure derived from the outdated Gross Revenues definition – directly contrary to what both parties testified was proper and directly in contravention of the methodology set forth in Sirius XM's post-trial briefing – satisfies that criterion. Nor does the Judges' rehearing denial in *Web IV*, to which SoundExchange adverts, suggest otherwise. There, the Judges rejected rehearing not on the basis that a specific number was not found in the record, but because the supporting theory that SoundExchange advocated for during rehearing was never advanced during the proceeding. *See Order Denying in Part SoundExchange's Motion for Rehearing and Granting in Part Requested Revisions to Certain Regulatory Provisions*, Docket No. 14-CRB-0001-WR (2016-2020), at 4-5 ("*Web IV Denial*").

[5] SoundExchange fails to explain why, if it was so clear before the Determination that Sirius XM would need to include its Premier and Transaction Fee revenue going forward, Mr. Orszag and Professor Lys did not add those into their *own* ARPU calculations. Clearly, tactical decisions are not limited to one side of a case.

[6] Sirius XM's pending appeal of the Underpayment Case, *see* SX Opp. at 8, is irrelevant for a similar reason. That appeal focuses on its payments during the *prior* license periods. It is the mismatch between the ARPU reflected in those prior payments and what is called for by the Judges' ruling here, going forward, that creates the error at issue.

is SoundExchange's assertion that the Judges can ignore this clear error because the resulting rate still "remains well within the range of reasonable rates in this proceeding." SX Opp. at 9. Unlike in past proceedings, the Judges here did not set such a range; they instead settled on the approach advocated by Professor Willig for calculating opportunity cost, and concluded that the resulting opportunity cost of [redacted] was a reasonable per-subscriber royalty. *See, e.g.*, Det. at 57. Nothing in the Initial Determination lends support to SoundExchange's assertion that a rate significantly higher than that set by the Judges nonetheless should be presumed to be reasonable. That SoundExchange may have advocated for such higher rates is irrelevant insofar as all such analyses were explicitly rejected by the Judges.

II. THE JUDGES' FAILURE TO JUSTIFY CHANGES TO THE REGULATIONS CONSTITUTES CLEAR ERROR

As discussed in Sirius XM's opening papers, the Judges erred by failing to identify and explain certain changes made to the governing regulations. SoundExchange's only response is to state that there was a basis in the record for adopting these changes. SX Opp. at 10. This misses the point. The Judges are required to provide in the Determination an explanation for doing what they appear to have done. As discussed in Sirius XM's opening papers, this failure amounts to clear and reversible error. *See* SXM Br. at 8-10.

CONCLUSION

For the foregoing reasons, and for those set forth in Sirius XM's opening papers, Sirius XM respectfully requests that the Judges grant Sirius XM's Motion for Rehearing and the relief requested therein.

Dated: January 25, 2018

Respectfully submitted,

By: _/s/ *Todd D. Larson*_____

R. Bruce Rich (NY Bar No. 1304534)
Todd D. Larson (NY Bar No. 4358438)
Jacob B. Ebin (NY Bar No. 4774618)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8238
Fax: (212) 310-8007
r.bruce.rich@weil.com
todd.larson@weil.com
jacob.ebin@weil.com

Counsel for Sirius XM Radio Inc.

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re **Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (SDARS III)**	**Docket No. 16-CRB-001-SR/PSSR (2018-2022)**

DECLARATION AND CERTIFICATION OF TODD D. LARSON
(On behalf of Sirius XM Radio Inc.)

1. I am counsel for Sirius XM Radio Inc. ("Sirius XM" or the "Company") in the above-captioned case. I respectfully submit this declaration and certification per the terms of the Protective Order issued on June 15, 2016 ("Protective Order"). I am authorized by Sirius XM to submit this declaration on Sirius XM's behalf.

2. I have reviewed Sirius XM's Reply in Support of Its Motion for Rehearing and accompanying Redaction Log submitted in this proceeding. I have also reviewed the definitions and terms provided in the Protective Order. After consultation with my client, I have determined to the best of my knowledge, information and belief that portions of Sirius XM's Reply in Support of Its Motion for Rehearing contain "confidential information" as defined by the Protective Order ("Protected Material"). The Protected Material is identified in the Redaction Log, shaded in the printed copies of Sirius XM's filing, and described in more detail below.

3. Such Protected Material includes highly confidential internal financial information, including per-subscriber revenue data, that is proprietary, not available to the public, and commercially sensitive. If this financial information were to become public, it would

place Sirius XM at a commercial and competitive disadvantage, unfairly advantage other parties to the detriment of Sirius XM, and jeopardize its business interests.

4. I understand that Sirius XM has not disclosed to the public or the investment community the financial information that it seeks to restrict here. As a result, neither the Company's competitors nor the investing public has been privy to that information, which the Company has viewed as highly confidential and sensitive and has guarded closely. In addition, when Sirius XM does disclose information about the Company's finances to the market as required by law, the Company provides accompanying analysis and commentary that contextualizes disclosures by its officers. The information that Sirius XM seeks to restrict under the Protective Order, while truthful and accurate to the best of the Company's knowledge, was not intended for public release or prepared with that audience in mind, and therefore was not accompanied by the type of detailed explanation and context that usually accompanies such disclosures by a company officer. Moreover, the statements containing the information have not been approved by Sirius XM's Board of Directors, as such sensitive disclosures usually are, or accompanied by the typical disclaimers that usually accompany such disclosures. Sirius XM could experience negative market repercussions, competitive disadvantage, and even possible legal exposure were this confidential information released publicly without proper context or explanation.

5. The financial information described in the paragraphs above and detailed on the accompanying Redaction Log must be treated as Restricted Protected Material to prevent business and competitive harm that would result from the disclosure of such information while, at the same time, enabling Sirius XM to provide the Copyright Royalty Judges with the most

complete record possible on which to base their decision regarding Sirius XM's Motion for Rehearing.

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: January 25, 2018
New York, New York

Todd D. Larson (N.Y. Bar No. 4358438)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Fax: (212) 310-8007
todd.larson@weil.com

Counsel for Sirius XM Radio Inc.

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re **Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (SDARS III)**	**Docket No. 16-CRB-001-SR/PSSR (2018-2022)**

SIRIUS XM'S REPLY IN SUPPORT OF ITS MOTION FOR REHEARING
REDACTION LOG

Pursuant to the requirements of the Protective Order entered by the Judges on June 15, 2016, Sirius XM Radio Inc. hereby submits the following list of redactions from Sirius XM's Reply in Support of Its Motion for Rehearing filed on January 25, 2018. The undersigned certify that the listed redacted materials meet the definition of "Restricted" contained in the Protective Order.

Page/Exhibit	Description
Page 1	Reflects material non-public financial information (Sirius XM confidentially reported per-subscriber revenue or information sufficient to derive it).
Page 2	Reflects material non-public financial information (Sirius XM confidentially reported per-subscriber revenue or information sufficient to derive it).
Page 3	Reflects material non-public financial information (Sirius XM confidentially reported per-subscriber revenue or information sufficient to derive it).

Page 4	Reflects material non-public financial information (Sirius XM confidentially reported per-subscriber revenue or information sufficient to derive it).
Page 5	Reflects material non-public financial information (Sirius XM confidentially reported per-subscriber revenue or information sufficient to derive it).

Dated: January 25, 2018

Respectfully submitted,

/s/ Todd D. Larson

R. Bruce Rich (NY Bar No. 1304534)
Todd D. Larson (NY Bar No. 4358438)
Jacob B. Ebin (NY Bar No. 4774618)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Fax: (212) 310-8007
r.bruce.rich@weil.com
todd.larson@weil.com
jacob.ebin@weil.com

Counsel for Sirius XM Radio Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2018, I caused a copy of the PUBLIC version of Sirius XM's Reply in Support of Its Motion for Rehearing and accompanying Declaration of Todd D. Larson and Redaction Log to be served by email to the participants listed below:

David Handzo Steven Englund Devi M. Rao Alex S. Trepp JENNER & BLOCK LLP 1099 New York Ave., NW, Suite 900 Washington, DC 20001 P: 202-639-6000 F: 202-639-6066 dhandzo@jenner.com senglund@jenner.com drao@jenner.com atrepp@jenner.com *Counsel for SoundExchange (SX); The American Federation of Musicians of the United States and Canada (AFM); Screen Actors Guild and American Federation of Television and Radio Artists (SAG-AFTRA); American Association of Independent Music (A2IM); Universal Music Group (UMG); Sony Music Entertainment (SME); Warner Music Group (WMG); Recording Industry Association of America (RIAA)*	Paul Fakler Margaret Wheeler-Frothingham ARENT FOX LLP 1675 Broadway New York, NY 10019-5874 P: 212-484-3900 F: 212-484-3990 paul.fakler@arentfox.com margaret.wheeler@arentfox.com Jackson Toof ARENT FOX LLP 1717 K Street, N.W. Washington, DC 20006-5344 P: 202-857-6000 F: 202-857-6395 Jackson.toof@arentfox.com *Counsel for Music Choice*
Rollin A. Ransom Peter I. Ostroff SIDLEY AUSTIN LLP 555 W. Fifth St., Suite 4000 Los Angeles, CA 90013 rransom@sidley.com postroff@sidley.com *Counsel for Sony Music Entertainment, Universal Music Group, and Warner Music Group*	George Johnson GEO Music Group 23 Music Square East, Suite 204 Nashville, TN 37203 P: 615-242-9999 george@georgejohnson.com *Pro Se Participant*

/s/ Meredith I. Santana
Meredith I. Santana

Certificate of Service

I hereby certify that on Thursday, January 25, 2018 I provided a true and correct copy of the Reply in Support of Sirius XM's Motion for Rehearing-PUBLIC to the following:

SAG-AFTRA, represented by David A. Handzo served via Electronic Service at dhandzo@jenner.com

American Federation of Musicians of the United Sta, represented by Jared O. Freedman served via Overnight Service

Universal Music Group, represented by Steven R. Englund served via Electronic Service at senglund@jenner.com

American Association of Independent Music ("A2IM"), represented by David A. Handzo served via Electronic Service at dhandzo@jenner.com

Music Choice, represented by Ross Panko served via Overnight Service

Recording Industry Association of America, The, represented by David A. Handzo served via Electronic Service at dhandzo@jenner.com

SoundExchange, Inc., represented by Devi M. Rao served via Electronic Service at drao@jenner.com

Sony Music Entertainment, represented by Peter I. Ostroff served via Overnight Service

Warner Music Group, represented by Steven R. Englund served via Electronic Service at senglund@jenner.com

Johnson, George, represented by George D Johnson served via Electronic Service at george@georgejohnson.com

Signed: /s/ Todd Larson